UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EKHAYA YOUTH PROJECT, INC.	*	
Respondent	*	
	*	
and	*	
	*	Case No. 15-CA-155131
DALANA ZIPPORAH MINOR,	*	15-CA-162082
An Individual	*	
	*	
	*	

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS CROSS EXCEPTIONS

Amiel Provosty
Counsel for the General Counsel
National Labor Relations Board
Region 15
F. Edward Hébert Federal Building
600 South Maestri Place, Seventh Floor
New Orleans, Louisiana 70130

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS

Amiel J. Provosty, Counsel for the General Counsel (Counsel) in the above case, submits this Brief in Support of Cross-Exceptions. This Brief sets forth the General Counsel's position concerning the exceptions to the findings of fact, and will identify those areas of the ALJD in which the ALJ erred as a matter of law.

I. PROCEDURAL FACTS REGARDING COUNSEL'S MOTION TO FURTHER AMEND THE AMENDED COMPLAINT AT HEARING[1]

On May 2 and 3, 2016, the Honorable Administrative Law Judge Arthur Amchan presided over the hearing in New Orleans. At hearing, Counsel moved that Judge Amchan allow the further amendment by Counsel of the April 18, 2016, Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 15-CA-155131 and 15-CA-162082 (Amended CNOH) as follows. (GC-1(t)) [2]

> 1. Amend paragraph 9(a) of the Amended CNOH to state as follows:
> On multiple days during June 2015, more exact dates currently unknown to General Counsel, Respondent's Employees Dalana Zipporah Minor (Minor) and Nicholas Davis engaged in concerted activities for the purposes of mutual aid and protection by (1) discussing Minor's salary with other employees; (2) discussing the work abilities of supervisors ; (3) discussing the work abilities of fellow employees; (4) discussing whether employees should receive promotions; (5) discussing the unfairness of the Continued Communication Policy; and (6) discussing Respondent's mistreatment of fellow employees. (Tr. 6:19-7:18).

[1] References to the transcript appear as (Tr. ##:##). The first number refers to the pages; the second to the lines. References to the Decision appear as (ALJD ##:##). References to General Counsel Exhibits appear as (GC #). References to Respondent Exhibits appear as (EYP #).

[2] See Cross-Exception 33. In the Administrative Law Judge's (ALJ) Decision (ALJD) the ALJ asserts "[T]he General Counsel moved to amend the complaint to allege that Respondent violated the Act by terminating Nicholas Davis." (ALJD 1:35-37) The ALJ did not list the related or alternative amendments requested by Counsel as noted in this section.

2. Amend paragraph 9(c) of the Amended CNOH to state that about June 22nd 2015 Respondent terminated Minor and Davis. (Tr. 7:19-20).

3. Amend paragraph 9(d) of the Amended CNOH to state that Respondent engaged in the conduct described above in paragraph 9(b) and 9(c) because Minor and Davis engaged in the conduct described above in paragraph 9(a), and to discourage employees from engaging in these or other concerted activities. (Tr. 7:21-25).

4. Amend paragraph 9(e) of the Amended CNOH to state that Respondent engaged in the conduct described above in paragraphs 9(b) and (c) because Minor and Davis violated the rules described above in paragraphs 5(a), 6, 7, and to discourage employees from engaging in these and other concerted activities. (Tr. 8:1-5).

5. Amend the Remedy Section of the Amended CNOH to state as follows:

(a) As part of the remedy for the unfair labor practice alleged above in paragraphs (9b) and (c), the General Counsel seeks an order requiring the Respondents reimburse Minor and Davis for all search for work and work-related expenses regardless of whether Minor and/or Davis received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall back pay period.

(b) In order to fully remedy the unfair labor practices and set forth above, the General Counsel seeks an order requiring that Minor and Davis be made whole including reasonable consequential damages incurred as a result of the Respondent's unlawful conduct. (Tr. at 9:12-24).[3]

II. STATEMENT OF THE FACTS

A. Background of Respondent

Respondent is a 501(c)(3) non-profit corporation that provides mental health services, social services, and substance abuse services to youth and their families throughout the State of Louisiana, including its administrative operations office (Bienville Office) and three other locations in New Orleans, Louisiana. (ALJD 2:5-7; GC 1(x); Tr. 44:24-45:2, 45:21-23).

[3] Counsel also moved to amend, in the alternative, Remedy paragraph (a) to reference Amended CNOH paragraphs to 9(b) and (c) regardless of whether Mr. Davis is added to the Amended CNOH as an unlawfully terminated employee. (Tr. 10:3-9).

B. Respondent's Unlawful Handbook Rules and Unlawful Corporate Compliance Program Rule

Chief Operating Officer VanShawn Branch (COO Branch), testified that Respondent's Handbook (Handbook) applies to all employees, supervisors, and managers across the State of Louisiana. (GC-1(x), at 5; Tr. 44:6-22).

i. Rules About Professional Ethics Which Restrict Protected Concerted Activities as Alleged in Amended CNOH Paragraph 7(b)

At pages 3-4 of the Handbook it states in part:

Subject: Professional Ethics

> Ekhaya Youth Project staff shall maintain professional ethics and standards at all times and will adhere to the highest moral standards while on duty working. Recognize that the youth and families may have suffered a dramatic emotional and/or physical trauma. Ekhaya Youth Project staff are their closest contact for emotional and physical support. Staff must meet their needs for attention and/or assistance without fail, if therapeutic goals are to be attained. . . .
>
> 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function). . . .
>
> 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times. . . .
>
> 13. Staff will protect the privacy of other staff at all times.
>
> 14. Staff will not give information of any nature about other staff to any unauthorized individual. (GC2, at 3-4).

ii. Rule That Further Restricts Employees Right to Discuss Terms and Conditions of Employment as Alleged in Amended CNOH Paragraph 7(c)

At page 4 of the Handbook it states in part:

Subject: Non-Disclosure

> The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project such confidential information includes, but is not limited to, the following examples: . . .
>
> 3. Financial information
>
> 4. Personnel information . . .
>
> Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information.(GC 2, at 4).

COO Branch testified that all payroll, except the minimum wage policy of $13.00 per hour, and all salary information was proprietary and confidential and the Respondent could not disclose it outside of the organization without the employee's permission, nor could any employee disclose it to any other employee within the organization. (Tr. 85:1-19).

iii. Overbroad and Coercive Rule Regarding Employee Conduct That Causes Discredit to Respondent as Alleged in Amended CNOH Paragraph 7(d)

> At pages18-19 of the Handbook it states in part:
>
> Subject: Disciplinary Action/Employee Performance Improvement Process: . . .
>
> B. Grounds for Discipline
>
> a. The following reasons constitute grounds for dismissal: . . .
> ix. The Employee has engaged in conduct, on or off duty that is of such a nature it causes discredit to the agency. (GC 2, at 18-19).

iv. Rule That Further Restricts Employees Right to Discuss Terms and Conditions of Employment as Alleged in Amended CNOH Paragraph 7(e)

The Corporate Compliance Program (Compliance Policy) also applies to employees and managers. (Tr. 46:12-16). At page 6 of the Compliance Policy it states in part:

> K. Personal and Confidential Information:
>
> Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families. (GC-3, at 6).

C. Respondent's Initial Promulgation of Unlawful E-mail Monitoring Rules and Termination of Employees Davis and Minor

Respondent hired Dalana Zipporah Minor (Minor) as a central office administrator at its Bienville Street headquarters in New Orleans on May 13, 2015, and she reported to Chief Operating Officer VanShawn Branch. (ALJD 2:17-18). Her duties included responding to correspondence, contacting outside vendors, and generally doing whatever COO Branch assigned. (Tr. 152:16-25). Minor worked on the second floor of the Bienville Office in the compliance office with three other employees (Yvette Frazier, Kenedra Graves and Stephanie McGrew) in close quarters. (Tr. 156:14-24, 162:19-22).

COO Branch testified that from his first floor office in the Bienville Office he could hear conversations occurring all over the building, including conversations occurring upstairs. (Tr. 66:7-14).

On May 14, 2015, Respondent hired Nicholas Davis (Davis) as an executive assistant to its Chief Executive Officer Darrin Harris (CEO Harris). (ALJD 2:14-15). Davis' duties included scheduling for CEO Harris, driving CEO Harris around, and coordinating details on the Respondent's ongoing construction and installation at the Gretna, Louisiana location (the Playhouse). (Tr. 259). Sometime after Davis' hire, CEO

Harris warned Davis that socialization and being friendly with other employees was not acceptable. (Tr. 277:24-278:3).

Respondent maintains a policy whereby romantic partners may not supervise each other, "in order to maintain the appropriate level of fairness and objectivity. (GC 2, at 13). COO Branch admitted his direct supervisor is CEO Harris. (Tr. 41:20-24).

On Friday, June 5, 2015, Minor rode in a car to the opening of the Playhouse. During the drive she commented to employee Frazier and to supervisor McNally that she was thankful for her new job and that Respondent was paying her $17.00 per hour, which came to about $35,000 in annual salary. (Tr. 157:13-25). No other employees' rates of pay were discussed.

On about Monday, June 8, 2015, Davis went to the Bienville Office to receive guidance from Minor on how to properly complete a work log. (Tr. 158:19-160:11, 261:1-12). Davis and Minor met in the computer lab located near COO Branch's office. (Tr. 160:9-15, 261:6-8). During the meeting Minor and Davis discussed that the fraternization policy was, in Davis' words, "kind of a joke," because CEO Harris and COO Branch were in a romantic relationship that was common knowledge among the employees, although CEO Harris and COO Branch thought no employees knew about it. (Tr. 261:25-262:5). Minor and Davis also discussed that they were not properly compensated by Respondent for their college experience compared to employees who had not completed any education beyond high school. (Tr. 263: 21-25). Minor and Davis discussed that when work is forgotten by managers it ends up as a burden on the subordinate employees. (Tr. 262:6-263:8). Minor and Davis also discussed how they were scared about making mistakes in paperwork, and discussed that employees were

easily terminated by Respondent. (Tr. 262:20-263:8; 263:12-13). They discussed their feeling that working for Respondent was not what they had expected, that they felt they were "walking around on eggshells," and were "nervous about coming to work." (Tr. 261:24, 263:3-11).

At trial, Respondent did not deny that CEO Harris and COO Branch were in an intimate relationship.

Also during the week of June 8, 2015, Minor was involved in another discussion related to working conditions with Yvette Frazier, Kenedra Graves, and Stephanie McGrew in the compliance office. (Tr. 161:13-165:22). Minor asked what Frazier did as a quality assurance employee. (Tr. 161:13-16). Frazier, who was hired at the same time as Davis and Minor, stated she had not received a job description. (Tr. 153:11-154:7). Minor stated she had just received hers that day, and shared it with the employees who were present. (Tr. 161:13-20). As they discussed the duties assigned to Minor, Graves (COO Branch's cousin) began to raise her voice, so McGrew closed the door to the compliance office. (Tr. 161:22-162:4, 163:17-20). The employees discussed that Minor was not actually a supervisor. (Tr. 161:22-162:7, 163:22-164:4). McGrew and Graves said they thought Minor's actual job was to be a snitch for COO Branch, because he was frequently not at the Bienville Office. (Tr. 162:5-13). Minor said she was not there to step on toes, but just to do the job that was assigned to her. (Tr. 163:25-164:6). The discussion included McGrew and Graves telling Frazier and Minor about the workplace conditions of employees under the supervision of Branch. (Tr. 238:8-17). The employees also discussed how raises are handled by Respondent. (Tr. 164:19-165:9). Minor stated that she wanted to be eligible for a raise. (Tr. 164:15-25). Graves said that Respondent

generously rewarded good work and described some of the raises she was entering into the payroll system for a few program managers working around the state. (Tr. 165:1-9).

During the discussion, supervisor Sumler opened the door and asked the employees why the door was closed. (Tr. 164:6-8). The employees said they were having a discussion, and supervisor Sumler responded that closed door discussions were not allowed. (Tr. 164:8-9). McGrew asked supervisor Sumler since when was closing the office door not allowed. (Tr. 164:10). Supervisor Sumler said the employees had never been allowed to close the office door, and they should not do it again. (Tr. 164:11-12). Prior to supervisor Sumler's announcement, Minor had never heard the rule that employees were not allowed to talk behind closed doors. (Tr. 165:13-22).

After Sumler apparently informed COO Branch about the closed door discussion, COO Branch met with Minor. (Tr. 84:4-86:8). COO Branch said he understood that Minor had discussed the salaries of employees including her own. (Tr. 59:11-61:14). COO Branch asked Minor if she had been talking with other staff about pay rates. (Tr. 84:22-25). COO Branch discussed with Minor the importance of confidentiality, and told her not to disclose "any staff person's pay rate to any other staff person who is not privy to that information." (Tr. 84:19-21). This prohibition against discussing pay rates was so general that it also prohibited Minor from telling other employees about her own pay rate and prevented Minor from discussing pay rates with employees who voluntarily informed Minor about their individual rate of pay.

At some time during the work week of Monday, June 8, to Friday June 12, 2015, CEO Harris told Davis that his background check revealed a pending criminal felony charge. (Tr. 264:14-24). CEO Harris told Davis that Davis had lied on his application.

Davis pointed out that the application only asked if Davis had ever been convicted of a felony. (Tr. 264:1-11, 264:24-265:3). Davis told CEO Harris that the pending matter was a marijuana-related charge, which he had not been convicted of, but he could not go into details about the open case. (Tr. 264:9-11, 265:4-7, 298:18-299:3). Davis was instructed to provide additional information to COO Branch regarding the criminal proceedings. (Tr. 100:10-12, 265:18-266:1).

At trial, COO Branch admitted that only a conviction for murder, manslaughter, molestation, or malpractice would prevent an applicant from being hired by Respondent. (Tr. 359:1-8).

On June 15, 2015, Davis wrote an email to COO Branch and CEO Harris stating that his lawyer would send additional information by letter concerning Davis' charge and upcoming court date. (GC 17; Tr. 265:15-266:4). On June 18, 2015 at 8:02 a.m., Davis' attorney sent an email to CEO Harris with a 'cc' to Davis stating:

> Mr. Harris, Please be advised that Mr. Davis has not been convicted on this matter and I do not believe this should affect his employment with your company in any way.
>
> If you should have any questions, or need additional information, please feel free to contact my office. (GC 18).[4]

The morning of June 18, 2015, COO Branch sent the following email to Minor, McGrew, Frasier and Graves:

> Please do not close the door to the Corporate Compliance Office. No meetings should be held in the Corporate Compliance Office without prior authorization from your immediate Supervisor. Any meeting held by Ekhaya Youth Project should have a sign-in sheet and meeting minutes.this [sic] Office door [sic] should never be close by any of the

[4] Harris and Branch reviewed the letter prior to Davis' termination, and Respondent did not request further information from Davis. Tr. 102:10-103:1; Tr. 267:7-10.

> individuals seated in the Corporate Compliance Office or any other office unless the Manager of the Department orders a meeting. (GC-4).[5]

Minor believed that this new rule was intended to allow supervisor Sumler to hear everything that was discussed in the compliance office at any time. (Tr. 165:13-22, 239:9-12). COO Branch testified that conversations occurring in Respondent's headquarters could be overheard by him while he was working because the building was small. (ALJD 2:21-22; Tr. 64:23-69:8). Compliance Officer and supervisor Nora Rowan testified she did not know there was a rule at the Bienville Office that employees could not have a meeting without permission from a manager prior to the email sent by CCO Branch. (Tr. 343:13-344:22).

At 3:33 a.m. on June 18, 2015, COO Branch sent an email to all the staff:

> Any emails forwarded and replied to by any Central Office Staff member must be carbon copied to the COO. Please be sure to follow the policy and procedure listed in this email. This policy is effective Thursday, June 18, 2015.
>
> In the event the email did not include the COO, please be sure to include the COO when replying. Responsiveness is required during the hours of 9am - 6pm and the promise to communicate will be exemplified via operation of the policy stated in this email. (GC-6; Tr. 166:8-11).

Based on the timing of the 3:33 a.m. email, it appears that the new work rule requiring the copying of COO Branch on all emails was also in response to the employees' closed door meeting where they discussed wages, job descriptions, and other working conditions under COO Branch's supervision.

The 'no closed door meeting without prior approval of management' and the 'copying of COO Branch on all emails sent by employees' (Continued Communication

[5] See Cross-Exception No. 18.

Policy) were first promulgated to Respondent's employees by email on June 18, 2015, and they were newly established work rules. (Tr. 166:12-18).

On June 18, 2015, COO Branch and supervisor Rowan conducted staff training at Respondent's office in Houma, Louisiana. (ALJD 3:15-17). Minor was working at her desk at the Bienville Office and Davis was accompanying CEO Harris on a trip to Monroe, Louisiana. (ALJD 3:17-18). Between 12:25 p.m. and 1:09 p.m. Minor and Davis exchanged the following text messages:

> Minor: R u n the loop about what's going down here?
>
> Davis: A little I heard they had an argument[6]
>
> Davis: What's up
>
> Minor: We have 2 have a surprise staff meeting on Monday. I think Mr. Branch hates Yvette.[7] I've been told my position is redundant by staff bc they don't need (want) 2b supervised. Total clusterfuck. [8]
>
> Minor: I just want 2 order supplies, make the office look cool, have everything run like a proper business. The latter goes against my anarchist principles.
>
> Davis: Why does Mr. Branch hate Yvette
>
> Davis: I love her
>
> Davis: Ask her to text me (ALJD 3:21-38).

[6] The text refers to an argument between employee McGrew and supervisor Sumler, related to management's scrutiny of employee Frazier's documentation of her lunch break. (Tr. 167:21-168:2, 274:19-21).

[7] Minor believed COO Branch disliked employee Frazier because Frazier had complained to Minor that a rule requiring employees to be back from lunch by 2:00 p.m. was dumb. (Tr. 168:13-169:3). At an earlier date Frazier and Minor discussed Respondent's lunch time policy and agreed that Minor would ask COO Branch why there was such a rule and why Frazier could not take her lunch hour whenever she wanted because Frazier wanted to go home to let her dog out when taking lunch later in the day. (Tr. 168:23-169:3). Minor did meet with COO Branch, and asked about the rule; he asked who brought it up. (Tr. 169:4-6). Minor stated that it had been Frazier. (Tr. 169:6-7). COO Branch said to Minor that he did not understand why Frazier was inquiring about rules and that if she did not like it, then that was her personal problem. (Tr. 169:7-9).

[8] This is a reference to the conversation between Minor, Frazier, Graves, and McGrew in the compliance office regarding job descriptions.

Davis wanted to understand the employees' issues going on at the Bienville Office, and understand why COO Branch did not like Frazier. (Tr. 268:3-8). Davis was concerned about COO Branch's treatment of Frazier, and how his influence over CEO Harris and the termination of employees could affect Frazier's job security. (Tr. 268:5-12). The texts continued.

> Minor: No idea. I don't know anything except I just need everyone 2 chill and get along.
>
> Davis: They check emails so I don't want to give her my number or talk via email with u all (ALJD 3:40-4:2).

Minor understood that Davis was referring to Respondent's ability to check emails in Respondent-provided email accounts. (Tr. 169:20-170:5). Davis testified he did not want to inquire about COO Branch disliking Frazier in an email for fear of losing his job. (Tr. 270:22-271:10).

> Minor: Omgg despite the fact they can check emails, they have implemented this new policy where we have CC Mr. Branch on EVERYTHING. (ALJD 4:4-5).

Minor was referring to the new email policy, the Continued Communication Policy, which COO Branch had announced at 3:33 a.m. that morning. (GC 6; Tr. 170:6-12).

> Davis: I really don't like him, he doesn't know his job forgets to do stuff assigned to him then wants to walk around like he's a big shit (ALJD 4:7-8).

Davis recalled a fire marshal inspection, necessary for opening Respondent's newest facility, the Playhouse, had not been properly handled by COO Branch, and so it was reassigned to employees: Davis and COO Branch's assistant Marte Robinson. (Tr. 260:13-15, 262:9-25, 271:6-11).

> Davis: He attempts to be little people who don't have a degree an he doesn't even have one
>
> Davis: I believe he doesn't like Yvette bc she's pretty, intelligent and a woman everything he want to be (ALJD 4:10-14).

Davis believed that COO Branch did not like anyone who challenged his authority or position. (Tr. 268:15-17). Davis thought COO Branch did not like Frazier specifically because, one, some men have issues with women correcting them, two, she was intelligent and had a college degree while Branch's background was working in retail, and three, she exhibited femininity. (Tr. 269:1-9).

> Minor: I dunno. Sometimes he bugs me but he's not going anywhere given the circumstances. I think Yvette challenging him is a poor career move if she wants 2 keep working with them. But I really want 2 stay out of it but I think I'm trapped n it so oh well.
>
> Davis: To challenge a supervisor when they are wrong is not wrong, he just feels because of his title he is entitled to be automatically right (ALJD 4:16-22).

Davis believed COO Branch's attitude about always being correct affected employees because if an employee corrects a mistake or oversight, COO Branch acted as if the employee was trying to undermine him. (Tr. 272:9-19). Davis believed COO Branch worked when he wanted and pressured employees to bend to his will under threat of termination, but COO Branch was unlikely to be fired due to his romantic relationship with CEO Harris. (Tr. 270:19-271:5). Minor also believed this by stating that COO Branch was not going anywhere.

> Minor: Yeah, but u gotta b way sneaky about it. It's like a got damn Disney villain scenario. "Sire perhaps we could try capturing Aladdin by…" "Cease your chatter, fool!"
>
> Davis: I see what your saying. (ALJD 4:24-27).

By Minor's Disney villain comment, she expressed how she thought Branch was unwelcoming of any employee input, suggesting that employees had to be "sneaky" when making suggestions. (Tr. 4:21-27)

Davis and Minor communicated via text messages because they knew they would have to copy COO Branch with any emails, and they wanted to prevent Respondent from learning about their communications about working conditions.

Davis and Minor did not know how COO Branch initially learned about the text messages. (Tr. 176:9-177:11, 272:6-8). Minor wondered if someone had seen Davis' phone screen. (GC 21; Tr. 176:9-177:11). Minor also wondered if someone looked at her phone screen when she left her phone unattended as she left her workspace and went to the restroom. (Tr. 171:5-9). [9]

After sending the last text at 1:09 p.m., Minor went on her hour lunch break. (Tr. 171:2-11). About 15-30 minutes after returning from lunch, Minor decided to take her 15 minute break. (Tr. 171:13-20). All the Bienville Office employees, except those in the billing office, were free to take their 15 minute break at any time. (Tr. 171:2-6). Minor set her phone timer for 15 minutes, and then put her head down on her desk. (Tr. 171:17-18).

About seven minutes into Minor's break she heard someone walk in the office, and she heard a shutter snap from a mobile phone camera. (Tr. 172:20-24). Minor lifted her head and saw supervisor Sumler, who stepped back "a little bit startled." (Tr. 172:24-173:2). Supervisor Sumler said that she came in to see why no one was answering the phone. (Tr. 173:3-4). Minor said that she heard it ring, but it was the main phone line and not her phone extension. (Tr. 173:6-13). Supervisor Sumler said that someone needed to

[9] See Cross-Exception No. 27.

answer the main phone. (Tr. 172:16-17). Minor stated that she was on her 15 minute break. (Tr. 173:17-18). Supervisor Sumler said it was Minor's responsibility to answer the main phone. Minor disagreed, and said it was Marte Robertson's job. (Tr. 173:23-174:6).[10] Supervisor Sumler stated the phone had been ringing and ringing, and that Minor needed to answer it. (Tr. 174:1-2, 8-13). Minor again said she was on break. (Tr. 174:14). Supervisor Sumler stated, "Well, we're all busy," and stormed out of the office. (Tr. 174:15-20).

Prior to June 18, 2015, Minor had never been told not to place her head on her desk during her 15 minute break. Similarly, Minor had never been told that she had to work during break. (Tr. 176:3-5).

COO Branch testified he received a call from supervisor Sumler stating that Minor was caught sleeping, but supervisor Sumler had corrected the issue. (Tr. 86:19-87:24). At 3:09 p.m., less than a half hour after the discussion between Minor and supervisor Sumler, COO Branch sent an email[11] to Minor, with a 'cc' to CEO Harris, supervisor Rowan and supervisor Sumler, stating in part,

> Please create an incoming call log. In addition, if you are not aware allow this email to be your notification that currently it is your responsibility to answer all incoming calls and document them via the log you will create. In the event you step away from your desk, please have Marte answer the phone.
>
> Once you develop the log, please forward it to me for approval. (GC 5; Tr. 174:23-175:4).

The ALJ mistakenly found that supervisor Sumler sent the above email to Minor. (ALJD 4: 33-36).

[10] Robertson worked downstairs on the first floor of the Bienville Office. Tr. 174:3-6.

[11] See Cross-Exception No. 26.

Prior to June 18, 2015, answering the main phone at the Bienville Office was not part of Minor's duties, nor was it in Minor's job description.[12] Answering the main phone line was Marte Robinson's job, and no one had ever told Minor she needed to answer the main phone or make a call log. 173:23-174:6, 175:5-14).[13]

On June 18, 2015, COO Branch was out of the office, conducting training in Houma, Louisiana. (Tr. 83:13-19). According to COO Branch, employee Graves called him and told him that Davis and Minor were gossiping about him. (Tr. 86:9-18. Additionally, at 4:05 p.m., Graves sent COO Branch an email. (EYP 7). This email basically notified COO Branch that Minor and Davis had been engaged in concerted complaining about working conditions.

Later on June 18, 2015, COO Branch arrived at the Bienville Office and summoned Minor to meet him in his office. (Tr. 176:9-12). When Minor arrived, supervisor Sumler was present and COO Branch was on the phone with someone who Minor believed to be CEO Harris. (Tr. 176:13-18). COO Branch asked Minor to tell him about the conversation between her and Davis. (Tr. 176:19-21). Initially, Minor did not know what COO Branch was asking about, but after COO Branch elaborated she realized he knew about the text messages. (Tr. 176:21-25). COO Branch asked Minor what Davis had texted about COO Branch and COO Branch's job performance. (Tr. 177:4-5). Minor admitted that she had exchanged some text messages with Davis. (Tr. 177:5-11). COO Branch asked to see the text messages on Minor's personal mobile phone. (Tr. 177:12-13, 178:1-4). Minor replied that she was not comfortable allowing COO Branch to have her

[12] See Cross-Exception No. 26.

[13] The Handbook states in part that a job description will "specify the actual duties and responsibilities of the positions." (GC 2, at 18).

personal property, and asked if she was in trouble. (Tr. 177:15-23). COO Branch became visibly upset, and said he did not trust Minor. (Tr. 177:16-18). COO Branch would not say whether Minor was in trouble or not, so Minor refused to show the text messages without a guarantee that she was not in trouble. (Tr. 178: 6-11). COO Branch then accused Minor of just wanting to cover her own ass. (Tr. 178:12). Minor responded, "Yes," because she had not done anything wrong. (Tr. 178:12-13). COO Branch admitted Minor did not want to show him the messages. (Tr. 88:13-89:2). Supervisor Sumler also admitted Minor did not want to disclose the text messages. (Tr. 249:8-10).

COO Branch reminded Minor that he was not quick to trust people, and he found Minor untrustworthy. (Tr. 178:15-19). COO Branch then asked if Minor and Davis were hanging out outside of work, and Minor denied ever doing so. (Tr. 178:23-25). COO Branch asked about a recent employee outing, and Minor told COO Branch that Davis was not at that social gathering of employees outside of work. (Tr. 178:25-179:10). COO Branch asked Minor if she felt that hanging out outside of work with other employees was behavior befitting an office administrator. (Tr. 179:11-13). Minor said she did not see a problem with it. (Tr. 179:13-15). COO Branch said it was unacceptable for Minor to hang out with other employees outside of work. (Tr. 179:16).[14]

COO Branch asked supervisor Sumler how they could be sure that Minor did not talk to the other employees about private or confidential information like salaries or other proprietary information. (Tr. 179:16-20). Several times during the meeting, COO Branch told supervisor Sumler that Minor had access to "it all" and "everything." (Tr. 179:20-

[14] Although not alleged as a separate 8(a)(1) violation, Branch informing Minor that she could not hang out with other employees outside of work was meant to chill employees' Section 7 activities in violation of the Act.

25). Supervisor Sumler shook her head in agreement, and said that Minor had access to confidential information. (Tr. 180:1-5). Supervisor Sumler testified that she believed that Minor was discussing employees' salaries with other employees. (Tr. 248:11-25).

Minor told COO Branch and supervisor Sumler that the only salary she had ever discussed was her own, and that she was comfortable doing so because it was not confidential to her, and it was not a measure of her worth as a person. (Tr. 180:8-13). COO Branch told Minor that she did not have a right to discuss that information and that her statement did not "appease" him or give any "credibility" to whether or not Minor discussed anyone else's salaries. (Tr. 180:14-17).

It is important to note that no employee testified at trial that they ever heard Minor discuss another employee's pay rate.

Minor finally gave in and showed COO Branch all the text messages between her and Davis to try to show that she had done nothing wrong. (Tr. 182:10-19). COO Branch then requested copies of screen shots but Minor refused. (Tr. 182:21-23).

At this point, Minor told COO Branch that she was a homosexual, and she did not agree with the message about Branch wanting to be pretty, intelligent, and a woman like Frazier, because it indicated a misunderstanding about the difference between sexual orientation and gender. (Tr. 182:23-183:5). COO Branch again asked for screen shots of the text messages, and Minor again refused to give him the screen shots. (Tr. 181:20-182:1, 183:20-21). COO Branch asked her to write a statement stating that she had received text messages from Davis about COO Branch's job performance. (Tr. 181:20-182:1, 183:20-21). Minor agreed to write the statement, and COO Branch walked away while talking on his phone to an unknown person. (Tr. 183:21-13). After about five

minutes, COO Branch returned and asked supervisor Sumler to bring him Minor's personnel file. (Tr. 184:5-10).

After supervisor Sumler returned with the file, COO Branch looked through it and asked, "Did we ever put a note in your file about how you did not have a completed bachelor's degree?" (Tr. 184:10-14). Minor said she did not remember. (Tr. 184:16). COO Branch stated, as he continued reviewing the file, that he "did not see that in here." (Tr. 184:16-18).

Because a degree was not required for Minor's position, she believed COO Branch was looking for a reason to fire her. (Tr. 184:19-185:8). Minor then told COO Branch that he did not have to go through a song and dance to try to find something in her file, and if he did not want her to be at his organization anymore, he could just say so. (Tr. 185:11-14). COO Branch slammed Minor's file closed, told her she had an attitude, directed her to go upstairs to pack her desk, and to leave before he called the police. (Tr. 185:14-17).

COO Branch and supervisor Sumler escorted Minor upstairs where she packed her desk in front of everyone in the compliance office. (Tr. 185:18-20). Later as Minor stood outside trying to load her things onto the bike she rode to work, she said to COO Branch that she liked working for the Respondent, knew he was upset, and knew he said he did not trust her. (Tr. 185:20-186:11). Minor stated that she wanted him to believe that she was trustworthy; she then captured the screenshots of the text messages and sent them to COO Branch. (Tr. 186:10-14).

The night of June 18, 2015, Davis was at Wal-Mart with CEO Harris in Monroe, Louisiana. (Tr. 273:5-20). Davis overheard CEO Harris on the phone with COO Branch

asking what was going on, and talking about the "mess" at the organization. (Tr. 273:10-12). CEO Harris then turned to Davis and said, "Mr. Davis, you better not be involved or you are going to be fired too." (Tr. 273:12-14). Davis was then told there would be an employee meeting the following Monday. (Tr. 273:14-15).

On June 18, 2015, at 8:23 p.m., COO Branch sent Minor a series of text messages informing her that she was temporarily on administrative leave pending further investigation. (GC 8; Tr. 97:17-98:3, 186:18-187:2). At 8:24 p.m., COO Branch texted Minor stating, "Please do not have any conversations with staff or it could possibly effect [sic] the outcome of the investigation." (GC 8). However, Davis did not receive a similar instruction from COO Branch or any other supervisor/manager.

Davis reported to the Bienville Office on Monday, June 22, 2015, for the special employee meeting. (Tr. 274:6-12). All employees from the New Orleans area facilities were present. (Tr. 275:1-5). CEO Harris led the meeting and talked about the "mess" growing in his organization. (Tr. 274:22-24, 275:6-11). CEO Harris said he needed to cut out the cancer, and if anything was being said about him, his personal life, or the Respondent, that he had a lawyer and would sue employees for slander. (Tr. 275:10-16). CEO Harris said he gave everyone an opportunity, but still he had this cancerous gossip going around his organization, and he was going to solve it that day. (Tr. 275:17-21).

Employees Frazier, Robertson, McGrew, and Davis as well as supervisor Sumler, were told to go to the back room of the Bienville Office while CEO Harris dealt with another matter. (Tr. 275:22-276:12). Thereafter, Davis was called up to the front of the first floor, and CEO Harris asked Davis how "this cancer would start from somebody so close to him," of all people, after he and Davis were together all week. (Tr. 277: 4-9).

At 10:41 a.m. on June 18, 2015, Davis sent a text message to Minor at 10:41 a.m. stating, "According to Mr. Harris some text messages were read an[d] I was fired and he referred to messages that I only sent to you." (GC 21).

On about June 22, 2015, Respondent mailed to Davis and Minor letters of termination and Discipline Documentation Notices. (Tr. 49:5-7, 50:1, 50:9-15, 187:11-14, 278:12-280:17, 282:2-25; GC 9; GC 10.2-4, 10.12).

The letter sent by Respondent to Davis stated in part:

> We regret to inform you that your employment . . . shall be terminated effective immediately.
>
> A formal grievance was filed and an investigation was conducted. After review of our findings, we determined you were in violation of the following policies:
>
> - EYP Employee Handbook, Conduct and Work Rules, 8. Insubordination or other disrespectful conduct.
> - EYP Employee Handbook, Conduct and Work Rules, 18. Unsatisfactory performance or conduct.
> - EYP Employee Handbook, Professional Ethics, 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function).
> - EYP Employee Handbook, Professional Ethics, 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.
> - EYP Employee Handbook, Professional Ethics, 13. Staff will protect the privacy of other staff at all times.
> - EYP Employee Handbook, Professional Ethics, 14. Staff will not give information of any nature about other staff to any unauthorized individual.
> - EYP Employee Handbook, Disciplinary Action/Employee Performance Improvement Process, Grounds for Dismissal, ix. The employee has engaged in conduct, on or off duty, that is of such a nature that it causes discredit to the agency.
> - Corporate Compliance Program, K. Personal and Confidential Information, Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families.

> Ekhaya Youth Project, Inc. will have to terminate your employment based upon these policy violations. If you have questions or concerns in regards to our findings, please feel free to contact the Human Resources Department. If you would like to appeal this matter, call 855-FSO-4YOU to file a grievance. (GC-10.2)

Respondent's letter to Minor was substantively identical to the letter sent to Davis. (GC 9).

The Discipline Documentation Notice that Respondent sent to Davis stated that Respondent was terminating him for a third offense. (GC-10.3). However, Respondent only noted two incidents in the document:

> Incidient [sic] 1: After receiving Mr. Davis' completed background check, it was determined that he had pending charges on his record. Mr. Davis was advised by the CEO, Darrin Harris, to produce a personal explanation and accompanying court documents to maintain compliance with OBH/CSoC requirements. He did not produce these documents, disobeying a direct request from his Supervisor.
>
> Incident 2: It was brought to the attention of the UMT that Mr. Davis had engaged in several inappropriate conversations with fellow employees, particularly Ms. Zipporah Minor, Central Office Administrator. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal likes/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered inappropriate familiarity among staff members and is strictly prohibited. Mr. Davis was also specifically advised not to cultivate friendships with other employees to maintain the strictest standards of privacy and confidentiality of the CEO, which he deliberately disobeyed. GC-10.3

Respondent's Discipline Documentation Notice included the policies he allegedly violated:

> 1.) EYP Employee Handbook, Conduct and Work Rules, 8. Insubordination or other disrespectful conduct. Violation of the policy when Mr. Davis disregarded the direct order from his supervisor to

produce an explanation of a pending charge and accompanying court documents. Additionally, he developed an inappropriate relationship with Ms. Zipporah Minor when he was advised not to cultivate friendships with Ekhaya employees to maintain a professional standard of privacy and confidentiality necessary to his position as Executive Assistant to the CEO.

2.) EYP Employee Handbook, Conduct and Work Rules, 18. Unsatisfactory performance or conduct. Violation of policy demonstrated when Mr. Davis did not produce the required personal explanation and court documentation of pending charges to maintain compliance with OBH/CSoC policy.

3.) EYP Employee Handbook, Professional Ethics, 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function). Violation of policy demonstrated through a relationship developed with Ms. Zipporah Minor that cultivated gossip, sharing of confidential information, and contributed to discomfort and distrust within the work environment.

Violation of the following policies were demonstrated when Mr. Davis contributed to conversations in person and via text discrediting the professional abilities and salaries of fellow employees and/or Supervisors and, additionally, gossiped about their personal lives.

4.) EYP Employee Handbook, Professional Ethics, 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.

5.) EYP Employee Handbook, Professional Ethics, 13. Staff will protect the privacy of other staff at all times.

6.) EYP Employee Handbook, Professional Ethics, 14. Staff will not give information of any nature about other staff to any unauthorized individual.

7.) EYP Employee Handbook, Disciplinary Action/Employee Performance Improvement Process, Grounds for Dismissal. ix. The employee has engaged in conduct, on or off duty, that is of such a nature that it causes discredit to the agency.

8.) Corporate Compliance Program, K. Personal and Confidential Information, Ekhaya Youth Project will protect personal and confidential information concerning the organization’s system, employees, and youth and families. (GC 10.4).

The Discipline Documentation Notice that Respondent sent to Minor stated that Respondent was terminating her for a third offense. (GC-9.1). Respondent described the three incidents as follows:

> Incidient [sic] 1: Ms. Minor was witnessed sleeping at her desk by multiple employees.
>
> Incident 2: Ms. Minor was regularly engaged in loud non-work related conversation. She was verbally warned and advised to stop participating in such conversation by her Supervisor VanShawn Branch. The behavior did not cease as advised.
>
> Incident 3: It was brought to the attention of the Supervisor, Mr. Branch, that Ms. Minor had engaged in several inappropriate conversations with fellow employees, particularly Mr. Nicholas Davis, Executive Assistant to the CEO. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal likes/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered inappropriate familiarity among staff members and is strictly prohibited. (GC 9.1).

Respondent's Discipline Documentation Notice included the policies she allegedly violated:

> 1.) EYP Employee Handbook, Conduct and Work Rules, 18. Unsatisfactory performance or conduct. Violation of policy demonstrated when Ms. Minor was asleep at her desk as witnessed by coworkers and also participated in an abundance of loud non-work related conversation disrupting the office environment and limiting the work completed.
>
> 2.) EYP Employee Handbook, Professional Ethics, 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function). Violation of policy demonstrated through a relationship developed with Mr. Nicholas Davis that cultivated gossip, sharing of confidential information, and contributed to discomfort and distrust within the work environment.
>
> Violation of the following policies were demonstrated when Ms. Minor contributed to conversations in person and via text discrediting the

professional abilities and salaries of fellow employees and/or Supervisors and, additionally, gossiped about their personal lives.

3.) EYP Employee Handbook, Professional Ethics, 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.

4.) EYP Employee Handbook, Professional Ethics, 13. Staff will protect the privacy of other staff at all times.

5.) EYP Employee Handbook, Professional Ethics, 14. Staff will not give information of any nature about other staff to any unauthorized individual.

6.) EYP Employee Handbook, Disciplinary Action/Employee Performance Improvement Process, Grounds for Dismissal. ix. The employee has engaged in conduct, on or off duty, that is of such a nature that it causes discredit to the agency.

7.) Corporate Compliance Program, K. Personal and Confidential Information, Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families. (GC 9.1-2).

D. Respondent's Investigation Was a Sham

Supervisor Rowan was the Corporate Compliance Officer at the time of the discharges, and she was assigned to investigate Minor's and Davis' alleged misconduct105:1). The record evidence indicates that Rowan's investigation was a complete sham. It is apparent that supervisor Rowan went through the motions of an investigation to create an impression that Respondent's pretextual reasons for discharging Minor and Davis were supported by reasons that were not unlawful.

Branch was in charge of terminating Davis and Minor. (Tr. 47:21-25). Branch was formerly the Corporate Compliance Officer, and Supervisor Rowan was the current Corporate Compliance Officer. Neither Branch nor Rowan had the authority to deviate from the employee Handbook at the time Minor and Davis were discharged. (Tr. 48:21-23, 63:24-64:8, 105:1-18). The Handbook sets out a progressive discipline policy:

> Ekhaya Youth Project has authority to take disciplinary action against any employee. . . . A process of progressive discipline is followed to ensure that employees are afforded adequate opportunity to correct unacceptable behavior. However, the seriousness of the offense may dictate overriding progressive discipline, and serious offenses may lead to immediate dismissal at any stage of the process. (GC 2, at 18).

Respondent states in the Handbook:

> In cases where performance becomes an issue and a youth is not put at risk, Ekhaya Youth Project will follow a plan for progressive discipline that shall be as follows:
> 1. Verbal Warning
> 2. Written Warning
> 3. Final Written Warning
> 4. 3 working day suspension, without pay, from the floor. The employee may not return to work until he/she has a conference with the Administrator.
> 5. Termination. (GC 2, at 13-14).

Respondent gives its employees the right to documentation "of all disciplinary actions," and "the consequences of continuation or recurrence" of the objectionable behavior prior to discharge. (GC 2, at 21). Additionally, Respondent's "Employees have the right to dispute or give a written rebuttal regarding any disciplinary action." (GC 2, at 20). Respondent also maintains a dispute resolution policy through its payroll provider Canal HR, which provides, "You may submit a complaint to the [Dispute Resolution Officer of Canal HR] about any matter that has affected or may affect [sic] you on the job." (GC 11, at ¶3; Tr. 126:20-25). Rowan admitted during her testimony that it was in Respondent's best interest to keep good records of discipline and performance problems. (Tr. 125:20-23). Rowan also testified that if an employee had a "conduct" violation it would be documented. (Tr. 123:17-18).

In fact, supervisor Rowan testified she did not apply use formal investigation processes or procedures for such an important investigation before recommending Minor's termination. In fact, Respondent did not follow its documentation or progressive

discipline policies in terminating Davis and Minor. Instead, supervisor Rowan merely reviewed Respondent's work rules to try to locate any that Minor and Davis could have violated so that she could cite them in a disciplinary action. (Tr. 106:8-108:18, 131:8-12, 140:14-141:10; GC-3, at 10). The falseness of supervisor Rowan's investigation is supported by the fact that Rowan did not interview key witnesses Minor, or COO Branch's cousin Graves, or Davis[15] as part of her investigation. (ALJD 6:6-7). Additionally, although the ALJ erroneously found Rowan interviewed supervisor Sumler during her investigation, supervisor Sumler's testimony flatly contradicts this finding. Sumler denied being interviewed by Rowan for the investigation. (ALJD 6:6-7; Tr. 252:14-21, 253:19-24).[16] Furthermore, supervisor Rowan's report and COO Branch's testimony both assert that Frazier told management that Minor was asleep at her desk. (GC 15; Tr. 51:2-8). However, at trial, Frazier denied seeing Minor asleep at her desk or telling anyone that she saw Minor asleep at her desk. (Tr. 254:21-255:17).

E. Respondent Reiterates and Alters Unlawful Email Policy

On August 11, 2015, at 12:35 p.m., COO Branch sent an email to employees stating,

> This email serves as a reminder. Please do not violate this policy. Any violations to any policy will be addressed by a Discipline Documentation Notice and followed by a Performance Improvement Plan. Please note our organizations policies are not personal. Find no offense in the reminder or the policy designed to protect you and assist you with compliance. Again, I repeat please follow this policy. (GC 7).
>
> In the typescript below the above paragraph in the above 12:35 p.m. email,

[15] See Cross-Exception No. 31.
[16] See Cross-Exception No. 30.

COO Branch restated the Continued Communication Policy originally promulgated on June 18, 2015. (GC 6; GC 7).

On December 18, 2015, COO Branch sent an email to all Bienville Office staff reiterating and altering the previously promulgated Continued Communication Policy. (Tr. 96:13-18). The email stated:

> The performance of your duties as an EYP Corporate Office employee which is conducted by e-mail must be conducted using EYP's e-mail system (ekhayafso.org and/or your ekhaya gmail account [first initial, last name eyp@gmail.com]) and not your personal e-mail. All e-mail which is sent by you and/or which is replied to or forwarded by you using EYP's e-mail system must be copied to the COO; in the event that an original email is received by you on EYP's e-mail system and the COO is not copied, you must forward a copy of that e-mail to the COO and copy the COO with any response on EYP's e-mail system. Responsiveness is required during office hours of 9:00 a.m. – 6:00 p.m. and the promise to communicate will be exemplified via operation of the policy stated in this email. The policy outlined in this email ensures 'continued communication' throughout the daily operations of the organization. For Ekhaya Youth Project, this policy is named the Continued Communication Policy and carbon copied or cc is the alternate descriptive. This policy is effective the date of this email. GC-16.

III. ARGUMENT

A. Amended CNOH Paragraph 5(a)

As noted in Cross-Exception Nos. 1 and 33, the ALJ erroneously found that Respondent did not violate the Act as alleged in Paragraph 5(a) of the Amended CNOH and that "Branch's explanation that conversations with other employees could possibly affect the outcome of the investigation satisfies Respondent's burden." (ALJD 7: 26-32; ALJD 8: 6-11).

In *Caesar's Palace*, 336 NRLB 271 (2001), the Board recognized an employer's instruction not to discuss a disciplinary investigation adversely affect employees' Section

7 rights. Therefore, an employer must establish a substantial and legitimate business justification to prevent employees from discussing an ongoing investigation. Here, Respondent did not offer any defense to the allegation, and the ALJ did not cite on Respondent's behalf, any specific substantial and legitimate business justification which would had made Respondent's instructing Minor not to discuss the investigation with any of her fellow employees lawful. There is no evidence employees would be subject to retaliation from Minor or Davis if they participated in the investigation, or that employees may have destroyed evidence, especially since Minor had already provided the text messages to Respondent prior to the instruction from COO Branch. *See Hyundai America Shipping Agency*, 357 NLRB No. 80, slip op. at 15 (2011) (requiring a showing that there must be actual risk that evidence might be destroyed, fabricated, or that witnesses might be intimidated).

Additionally, the lack of substantial and legitimate business justification in instructing Minor not to talk to staff about the investigation is supported by the fact that supervisor Rowan, as noted above, did not even talk to key staff members (Minor, Graves, Davis, and supervisor Sumler) about the investigation. Similarly, the fact that Davis was not given the same instruction as Minor clearly demonstrates that Respondent did not have any substantial and legitimate business justification in instructing Minor not to talk with staff.

Based on the above, Respondent failed to meet is burden that it had a substantial and legitimate business justification for instructing Minor not to discuss the investigation with any of her fellow employees.

B. Amended CNOH Paragraph 6

As stated in Cross-Exceptions Nos. 2, 8, 10, 19, 20, 21, and 33, the ALJ erroneously found that Respondent did not unlawfully prohibit employees from discussing their salaries.

As previously noted, sometime in June 2015, after Minor had the closed door discussion with her coworkers about terms and conditions of employment, COO Branch met with Minor and asked her if she had been speaking to staff about pay rates. COO Branch told her not to disclose "any staff person's pay rate to any other staff person who is not privy to that information." (Tr. 84:19-25).

Thereafter, on June 18, 2015, during COO Branch's interrogation of Minor about her protected concerted text message conversation with Davis, COO Branch asked Minor how he could be sure that Minor did not talk to other employees about salaries. (Tr. 179:20-25). Minor specifically told COO Branch and supervisor Sumler that the only salary she had ever discussed was her own, and that she was comfortable doing so because it was not confidential to her, and it was not a measure of her worth as a person. (Tr. 180:8-13). COO Branch then informed Minor that she did not have a right to discuss that information, and her statement did not "appease" him or give any "credibility" to whether or not Minor discussed anyone else's salaries. (Tr. 180:14-17).

"The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303 (2003).

ALJ erroneously found that due to her position, Minor did not have the right to discuss employees' salaries she learned about via her employment position. (ALJD 5:30-

36, 9:6-20, 13:24-28, 14:45-15:10). The evidence demonstrates that COO Branch emphasized to Minor that she could not discuss anyone's salaries, even her own. (ALJD 9:12-20). The Board has found that when an employer does not treat information as confidential, an employee who learns information in the regular course of his work may use the information in conjunction with protected interest. *L.G. Williams Oil Co.*, 285 NLRB No. 48 (1987). Aside from the overboard unlawful Handbook rules about personnel and financial information, there was no evidence was presented at trial that Respondent informed employees that it considered all wage information confidential before the before the closed door concerted discussion between Minor and other employees in June 2015.

Additionally, it is important to note that no witness testified at the hearing that they heard Minor tell employees about the pay rate of other employees. Moreover, Minor told COO Branch that she only told employees about her pay and that she was comfortable with telling other people about her salary. However, Respondent' blanket rule prohibited Minor from telling other employees about her salary. (Tr. 180:14-17). At a minimum, Branch's instruction to Minor that Respondent's the confidentiality policy prohibited Minor from talking about her own rate of pay was in violation of the Act. *Leather Center, Inc.*, 312 NLRB 521, 527 (1993) (rule or policy barring employees from any discussion of wages, unlawful).

C. Amended CNOH Paragraph 7 – Respondent's Unlawful Handbook Provisions

In determining whether a work rule violates the Act, the Board considers whether the rule would reasonably tend to chill employees in the exercise of their statutory rights. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007), (discussing *Lutheran*

Heritage Village-Livonia, 343 NLRB 646 (2004). The Board engages in a two-step inquiry that first focuses on whether the rule restricts Section 7 activity on its face. *Id*. If the rule does not violate the Act on its face, the Board considers whether one of the following three conditions exists: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id*. Rules which are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. *See University Medical Center*, 335 NLRB 1318, 1320–22 (2001).

i. <u>Paragraph7(b) Rules About Professional Ethics Which Restrict Protected Concerted Activities</u>

As noted in Cross-Exceptions Nos. 3, 8, 11, and 33, the ALJ erroneously found that the rules alleged in Paragraph 7(b) do not violate the Act.

At pages 3-4 of the Handbook, Respondent states as an ethical rule that "*Inappropriate familiarity among staff members (will not occur in the facility or during any program function*)." (GC 2, at 3-4). Although the language does not explicitly restrict Section 7 activities, the rule does not contain any examples of the type of conduct considered "inappropriate familiarity." Therefore, employees may reasonably understand it to prohibit employees' from engaging in their Section 7 right, such as meeting with their fellow employees after hours, to discuss terms and conditions of employment. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998) enforced mem., 203 F. 3d 52 (D.C. Cir. 1999); *University Medical Center, supra.* The rule was also cited in the termination documents and replied upon in discharging Minor and Davis. Therefore, it was applied to

restrict the exercise of Section 7 rights and is unlawful. *Lutheran Heritage Village-Livonia, supra.*

At pages 3-4 of the Handbook, Respondent's ethical rule states, "*Staff will strive to work together as a cohesive team, supporting one another and administration at all times*." (GC 2, at 3-4). This rule is ambiguous on its face. It could encompass any disagreement between employees and management, including activities protected by Section 7 of the Act. *Sisters Food* Group, 357 NLRB No. 168 (2011). The rule was also cited in the termination documents as a basis for discharging Minor and Davis. Therefore, the rule was applied to restrict the exercise of Section 7 rights and violates the Act. *Lutheran Heritage Village-Livonia supra.*

At pages 3-4 of the Handbook, Respondent states as an ethical rule that "*Staff will protect the privacy of other staff at all times.*" (GC 2, at 3-4). Although the Board generally finds confidentiality rules lawful so long as there are no references to information regarding employees or anything that could be considered a term or condition of employment, Respondent's rule specifically references information about other staff and does not define the type of information which must remain private. Therefore, employees may reasonably conclude the rule to unlawfully restrict their Section 7 right to discuss terms and conditions of their employment. Such a conclusion is reinforced by Respondent's citing the rule in Minor and Davis' discharge documentation and was relied upon in discharging them. Thus, the rule was applied to restrict Minor and Davis' Section 7 rights and consequently violates the Act. *Sisters Food Group*, 357 NLRB No. 168 (2011); *Lutheran Heritage Village-Livonia, supra.*

At pages 3-4 of the Handbook, second ethical rule states, "*Staff will not give information of any nature about other staff to any unauthorized individual*." (GC 2, at 3-4). This rule is also overly broad. Respondent rule does not provide any explanation of what is authorized or unauthorized. This rule clearly includes information regarding employees and prohibits the distribution of information of any nature about employees to any unauthorized individual. Under the standard set forth in *Lafayette Park Hotel supra*, Respondent's rule is unlawful on its face because it (1) specifically references information regarding employees, (2) explicitly prohibits discussion of information of any nature about other staff, which could include employee grievances, wages, hours, discipline and other terms and conditions of employment, and (3) was applied to restrict Section 7 rights when it was cited in Minor and Davis' discharge documents and relied upon by Respondent to discharge them.

ii. <u>7(c) Rule About Non-Disclosure Which Further Restricts Employees Right to Discuss Terms and Conditions of Employment</u>

As noted in Cross-Exceptions Nos. 4, 8, 11, and 33, the ALJ erroneously improperly found the rules alleged in Paragraph 7(c) do not violate the Act.

At page 4 of the Handbook, Respondent states as a "Non-Disclosure" rule, that

> *The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project such confidential information includes, but is not limited to, the following examples: . . .*
> *3. Financial information*
> *4. Personnel information . . .*
> *Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information.* (GC 2, at 4).

Although the rule does not specifically reference information regarding employees, the blanket prohibition on discussing financial information and personal information can reasonably be interpreted to include information about employees' wages and terms and conditions of employment. Accordingly, the rule is unlawfully overbroad. *See Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

iii. 7(d) Overbroad and Coercive Rule Regarding Employee Conduct That Causes Discredit to Respondent

As noted in Cross-Exceptions No. 5, 8, 11, and 33, the ALJ erroneously found the rules alleged in Paragraph 7(d) do not violate the Act.

At pages18-19 of the Handbook it states in part:

> *Subject: Disciplinary Action/Employee Performance Improvement Process: . . .*
> *B. Grounds for Discipline*
> *a. The following reasons constitute grounds for dismissal: . . .*
> *ix. The Employee has engaged in conduct, on or off duty that is of such a nature it causes discredit to the agency*. (GC 2, at 18-19).

Employees have the Section 7 right to criticize or protest their employer's labor policies and/or treatment of employees. Moreover, rules that can be reasonably be read to prohibit employees from engaging in protected concerted criticism of their employer will be found to be unlawfully overbroad. *Tradesman Intl.,* 338 NRLB 460, 460-62 (2002). Here, Respondent's rule contains no clarification or examples of illegal or unprotected conduct, "of such a nature it causes discredit to the agency." Accordingly, employees could reasonably understand the term "discredit" to include protected statements or discussions that criticize Respondent's employment practices or its pay and treatment of employees. Thus, the rule is unlawfully overbroad. Additionally, the unlawfully overboard rule was cited in the discharge documentation and was relied upon to

discharge Minor and Davis for criticizing a supervisor's performance, and failure of managers to abide by the no fraternization rule resulting in COO Branch's undue influence. Thus, the rule was also applied by Respondent to restrict employees from exercising their Section 7 rights and is therefore unlawful. *Lutheran Heritage Village-Livonia, supra.*

iv. 7(e) Compliance Policy Rule That Further Restricts Employees Right to Discuss Terms and Conditions of Employment

As noted in Cross-Exceptions Nos. 6, 8, 11, and 33, the ALJ erroneously found the rules alleged in Paragraph 7(e) do not violate the Act.

On page 6 of the Compliance Policy the "*Personal and Confidential Information,"* section, Respondent states employees, *"Will protect personal and confidential information concerning the organization's system, employees, and youth and families."* GC-3, at 6. This rule is clearly overly board on its face, because it does not include the limiting language or examples of what information Respondent considers confidential that does not infringe on its employees' Section 7 rights. Therefore, the rule is unlawful on its face since it can reasonably be considered to explicitly restrict employees' Section 7 rights. Additionally, the rule was applied to restrict Davis and Minor in their exercise of Section 7 rights when it was cited in the discharge documentation and relied upon by Respondent to discharge Minor and Davis. *Lutheran Heritage Village-Livonia, supra*.

D. Amended CNOH Paragraphs 8(a) and 8(b) – Continued Communication Policy

As noted in Cross-Exception Nos. 7, 8, and 11, the ALJ erroneously found the rules alleged in Paragraph 8(a) and 8(b) do not violate the Act.

In response to COO Branch learning that some of Respondent's employees, including Minor, were discussing terms and conditions of their employment behind closed doors, COO Branch sent out two emails on June 18, 2015, announcing two new rules meant to prevent employees from exercising their Section 7 rights. (GC 4; GC 6; Tr. 153:11-154:7, 161:13-20, 161:22-162:7, 163:17-20, 163:22-164:4, 164:6-12, 164:15-165:9). The blanket rule included employee group discussions during breaks regarding wages and other terms and conditions of employment.[17]

The second email announced a new policy requiring employees to copy COO Branch on all emails sent by employees. (GC 6). Such an overly broad rule would include nonwork emails sent by one employee to another employee while on break regarding concerted complaints about a terms and conditions of employment or an organizational effort.

It is readily apparent that the purpose of both emails was to chill employees in the exercise of their Section 7 rights. The rule requiring employees to get prior authorization to meet was designed to discourage employees from meeting to discuss employee work related concerns. The purpose of the second email was also to discourage employees from discussing any terms and conditions of employment via the employer provided email system during working and nonworking time. Such a rule would clearly chill employees from sending emails about organizing or other protected concerted activities. *See Purple Communications*, 361 NLRB 126 (2014) (employee use of email for statutorily protected communications on nonworking time must presumptively be

[17] Although not alleged as a violation of Section 8(a)(1) of the Act, the policy prohibiting employees from meeting behind closed doors and without supervisor permission was promulgated in violation of the Act. *Lutheran Heritage Village-Livonia* analysis. s*upra.*

permitted by employers who have chosen to give employees access to their email systems).

In fact, the June 18, 2016 email policy actually prevented employees from using the email system to engage in protected concerted activity. This is evident by one of Davis' texts to Minor on June 18, 2016. As part of the text exchange between Davis and Minor, Davis texted, "They check emails so I don't want to give her my number or talk via email with u all." Thus, the rule discouraged Davis from communicating with Frazier via email regarding how COO Branch was treating her.

On December 18, 2015, Respondent reiterated its new rule requiring employees to copy COO Branch on all emails produced by employees.

Based on the above, the rule requiring employees to include COO Branch on all emails would reasonably tend to chill and in fact did chill employees in the exercise of their Section 7 rights. *See Lafayette Park Hotel, supra.* Because Respondent has not provided evidence of special circumstances to justify the requirement that all emails be copied to COO Branch, the policies announced in the emails are unlawful. *See Purple Communications, supra.*

E. Amended CNOH Paragraph 9 – Terminations of Minor and Davis

As noted in Cross-Exceptions Nos. 8, 9, 22, 23, 24, 25, 32, and 33, the ALJ erroneously found that Minor and Davis did not engage in protected concerted activities via their text messages and erroneously found that Respondent did not believe Minor and Davis engaged in protected concerted activities.

i. The Text Messages Were Protected Concerted Activity

Employee complaints and criticism about a supervisor's attitude and performance may be protected by the Act,[18] and that the protest of supervisory actions is protected conduct under Section 7.[19] Moreover, the complaints do not have to be "earth shattering" in order to enjoy protection under the Act.[20] Because the text messages were part of a discussion of employees' shared concerns about terms and conditions of employment, Minor and Davis' conduct was part of their concerted activity for mutual aid and protection.

It is well settled that the Board will find concert "[w]hen the record evidence demonstrates group activities, whether 'specifically authorized' in a formal agency sense, or otherwise[.]"[21] Indeed, when employees express group concerns and one individual employee continues to express this concern on his or her own, the Board will find the individual employee was continuing a course of concerted activity.[22]

In addition, even in the absence of earlier group discussion and/or complaints about working conditions, an individual employee's complaint regarding shared concerns about terms and conditions of employment or which would inure to the benefit of other employees is appropriately considered concerted activity for mutual aid and protection under the Act.

---

[18] See, e.g., *Arrow Electric Company, Inc.*, 323 NLRB 968 (1997), enfd. 155 F.3d 762 (6th Cir.1998); *Avalon-Carver Community Center*, 255 NLRB 1064 (1981).
[19] See, e.g., *Datwyler Rubber and Plastics, Inc.*, 350 NLRB 669 (2007); *Groves Truck and Trailer*, 281 NLRB 1194 (1986).

[20] *Arrow Electric* at 971, citing *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984).
[21] *Meyers Industries (Meyers II)*, 281 NLRB 882, 886 (1986), enfd. 835 F.2d 1481 (D.C. Cir. 1987).
[22] See, e.g., *JMC Transport*, 272 NLRB 545, 545 fn. 2 (1987) (finding protected truck driver's lone protest to management regarding a discrepancy in his paycheck, where it "grew out of an earlier concerted complaint regarding the same subject matter, i.e., the change in the pay structure."), enfd. 776 F.2d 612 (1984); *Alton H. Peister, LLC*, 353 NLRB 369, 373 (2008) (finding protected truck driver's continued protest to management regarding fuel surcharge despite other employees accepting the policy change).

Here, the text messages were part of a multi-employee discussion of terms and conditions of employment. It is obvious more than one employee was involved. Davis and Minor resumed their earlier discussions about employees working conditions from June 8, 2015. Such discussions, in and of themselves, appropriately constitute concerted activity for mutual aid and protection under Section 7.

The Board has articulated an additional requirement that to be protected, concerted activity "must seek to initiate or to induce or to prepare for group action."[23] This is most clearly met when an employee group discussion expressly includes the topic of collective action.[24] This requirement may also be met when the discussion does not include a current plan to act to address the employees' concerns. In this regard, the Board has long described concerted activity "in terms of interaction among employees."[25] As it has explained in a variety of circumstances, employees' discussion of shared concerns about terms and conditions of their employment, even when "*in its inception* [it] *involves only a speaker and a listener*, . . . is an indispensable preliminary step to employee self-organization."[26] For example, the Board has found unlawful discipline imposed on employees for their discussions of common concerns about wages[27] or work schedules,[28]

---

[23] *Triple Play Sports Bar & Grille,* 361 NLRB No. 31 (2014), slip opinion at p. 3.

[24] See, e.g., *Service Employees' Local 1*, 344 NLRB 1104, 1105-1106, 1108-1110 (2005) (employee's discussions with fellow employees suggesting that they confront their employer regarding shared concerns about working conditions "clearly constituted concerted activity protected by Section 7 of the Act"); *Root-Carlin, Inc*., 92 NLRB 1313, 1314 (1951) (conversations with co-workers urging them to unionize protected). Such conduct is protected even if the employee is unsuccessful in persuading other employees to join in group action. See, e.g., *El Gran Combo,* 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988).

[25] *Meyers I*, 268 NLRB 493(1984); *Meyers II*, 281 NLRB at 887, quoting *Root-Carlin*, 92 NLRB at 1314.

[26] *Ibid*.

[27] *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enfd. 519 F.3d 373 (7th Cir. 2008) (employee discussions about the effect of a new performance evaluation policy on wages held concerted, despite lack of evidence that employees contemplated group action); *Trayco of S.C.*, 297 NLRB

even when no specific group action was discussed, because "it is obvious that discussions of this kind usually precede group action."[29] Moreover, in the context of evaluating employer rules, the Board has long held unlawful rules that prohibit discussion of wages,[30] vacation and leave,[31] or other terms and conditions of employment,[32] explaining that the maintenance or enforcement of rules embodying such restrictions interfere with employee rights because such discussions are the prerequisite to group action.[33] Indeed, an employer's discharge or other action against an employee will be found unlawful if it was undertaken to prevent future employee discussion of terms and conditions of employment.[34]

630, 633-34 (1990), enf. denied mem., 927 F.2d 597 (4th Cir. 1991) (employee discussions with other coworkers about apparent wage differential between new hires and more senior employees constituted concerted activity; object of inducing group action need not be express).

[28] *Aroostook County Regional Ophthalmology Center*, 317 NLRB 218, 220 (1995), enf. denied on other grounds, 81 F.3d 209, 214-215 (D.C. Cir. 1996) (employee discussions about scheduling changes found concerted even though no object of initiating group action).

[29] *St. Margaret Mercy Healthcare Centers*, 350 NLRB at 212.

[30] See, e.g., *Automatic Screw Products*, 306 NLRB 1072 (1992), enfd. mem., 977 F.2d 582 (6th Cir. 1992); *Flamingo Hilton*, 330 NLRB 287, 289 n.3 (1999).

[31] See, e.g., *Mesker Door*, 357 NLRB No. 59, slip op. at 16 (2011) (ALJD) ("the way an employer handles employee requests for [vacation and Family and Medical Leave Act] leave significantly affects working conditions. Logically, a rule restricting the discussion of these terms of employment interferes with the exercise of Section 7 rights just as much as a rule forbidding employees from talking about wages").

[32] See, e.g., *Hilton's Environmental*, 320 NLRB 437, 454 (1995) (employer's instructions to not discuss work related matters with anyone, including each other outside of work, were "plain and obvious" violation of Section 8(a)(1)); *Claremont Resort & Spa*, 344 NLRB 832 (2005) ("rule's prohibition of "negative conversations" about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities". See also *Parexel International, LLC*, 356 NLRB No. 82, slip op. at 3, n.8 (2011) (the principles demonstrating that discussion about wages is at the core of Section 7 rights "apply equally to employees' discussion of possible discrimination in the setting of terms or conditions of employment").

[33] See, e.g., *Triana Indus*tries, 245 NLRB 1258 (1979) (discussions of wages "may be necessary as a precursor to seeking union assistance and is clearly concerted activity").

[34] See *Parexel International*, 356 NLRB No. 82, slip op. at 4 (termination of employee for engaging in discussions about terms and conditions of employment was an unlawful "pre-emptive strike" designed to prevent the employee from discussing such matters with other employees), and cases cited therein, slip op. at 4, n.9.

Under the principles announced above, the text messages were protected concerted activity for mutual aid and protection.

Furthermore, the ALJ erred in asserting that there was no plan of action or contemplation of further action to address working conditions. The record objectively shows a progression and intention by the employees. After the June 8, 2015 conversation between Minor and Davis about working conditions, they engaged in the texts further discussing working conditions under Branch. At the conclusion of the exchange, Davis clearly expressed a desire to get in touch with Frazier and "u all" about how Branch was treating Frazier and about working conditions at the Bienville Office, when Davis asked Minor to have Frazier text him. (ALJD 3:38, 4:1-2). Contrary to the characterization of the ALJD, this is not mere gossiping. Davis and Minor also contemplated future action when Davis declared that challenging a supervisor when they are wrong is not wrong, and Minor agreed but said that employees had to be "sneaky" about it like a "Disney villain".

In summary, the text messages are protected because they arose as part of Davis and Minor's discussion regarding their shared concerns about terms and conditions of their employment. The text messages expressed two employees' concerns about a supervisor's attitude and managerial style, and directly attributed to those characteristics a negative impact on the workplace, and on employees' attitudes. In their texts, Minor and Davis connected their concerns about COO Branch's supervisor's attitude directly to its impact on employees' attitudes. Specifically, in their text messages they stated they would have to be "sneaky' as a "Disney villain" in order to make suggestions about the workplace or complaints about working conditions. Thus, the text messages were a part

of Davis and Minor's group discussion of their terms and condition of employment, and their shared employee concerns regarding them. Therefore, the text messages are protected concerted activity.

ii. Minor and Davis Were Terminated because of their Protected Concerted Activities

The ALJ erred in not finding Minor and Davis were terminated because of their protected concerted activities. As explained above, Minor and Davis were engaging in protected concerted activity when Minor and Davis texted to each other about their working conditions and the working conditions of fellow employees. The protected concerted activity was the motivating factor in the discharges. Additionally, Minor and Davis did not lose the protection of the Act through their actions.

The record evidence demonstrates that Respondent was aware of Davis and Minor's protected concerted activities, and bore animus toward Minor and Davis because of those activities. Respondent's animus is evidenced by the testimony of COO Branch, and the language contained in Davis and Minor's discipline and discharge paperwork.

Because the text messages are evidence of protected concerted activity and the rules relied upon by Respondent to discharge Minor and Davis are unlawful work rules, the burden shifted to Respondent to show that it would have taken the same action even in the absence of Davis and Minor's protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980). Here, the only other reasons Respondent submitted for terminating Minor were that she was sleeping at work and had been warned about loud non work conversations. Here, Minor testified that she was on her break when she laid her head on her desk. Respondent did not present any evidence to refute Minor's assertion that she was on break or that she had never before been told employees are not allowed to close

their eyes and rest while on break. Therefore, Respondent's assertion that Minor was sleeping during work was pretextual and supported by false documentation. Second, the Respondent did not introduce any documentary evidence to support the claim that Minor had been warned about non-work related conversations despite maintaining a progressive discipline policy that required documentation of all warnings and disciplinary actions. (GC 2, at 13-14, 20-21; GC 22; GC 23; Tr. 123:17-18; 125:20-23). Based on the above, Respondent has not met its burden of showing that it would have terminated Minor regardless of her activities protected by the Act.

In the case of Davis, the evidence does not support a finding that Respondent would have terminated Davis regardless of his engaging in activities protected by the Act. One of the items Respondent cobbled together as the basis for Davis' termination was that he had lied on his job application regarding a conviction and then refused to provide information on the pending criminal charge. (GC 10.3).As the undisputed evidence shows, the job application only required Davis to disclose convictions on the application, not matters yet to be adjudicated. Because the matter was still pending, Davis did not lie on his application. Additionally, Respondent did not dispute at hearing that Davis informed CEO Harris that the pending charge was marijuana related, and that Davis' lawyer sent an email to COO Branch and CEO Harris regarding the status of the criminal case. (Tr. 264:9-11, 265:4-7, 298:18-299:3; GC 17; GC 18). Based on the above, Respondent has not met its burden of showing that it would have terminated Davis regardless of his activities protected by the Act.

iii. Minor And Davis Did Not Lose Protection Of The Act.

As noted in Cross-Exceptions Nos. 12, 28, and 29, the ALJ erroneously found that Minor and Davis lost the protection of the Act. The Board in *Atlantic Steel* established that "an employee who is engaged in concerted protected activity can, by *opprobrious conduct*, lose the protection of the Act." 245 NLRB 814, 816 (1979) (emphasis added). In determining whether employee conduct is so "opprobrious" as to forfeit protection under the Act, the Board considers four factors: "(1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice." *Id.* The application of the second and fourth factors to the text messages is straightforward: the subject matter and whether the discussion was provoked by an unfair labor practice. The subject matter of the employees' text messages weighs in favor of protection because they were complaints about COO Branch and his effect on the workplace and working conditions. All the complaints are about patently protected subjects and, as discussed above, were made during an employee discussion of the workplace and several other Section 7 subjects that involved or implicated terms and conditions of employment. Weighing against a finding that Minor and Davis lost the protection of the Act is the fact that their text discussion was provoked by Respondent implementing the new unlawful rule preventing employees from meeting behind closed doors unless authorized by Respondent and another unlawful rule, the Continued Communication Policy, requiring employees to copy COO Branch on all emails.

The remaining *Atlantic Steel* factors -- the location of the conversation and the nature of the outburst -- must be adapted to reflect the inherent differences in a text message discussion between two employees on their private mobile phones from an

outburst in the workplace. The text messages were not public, and they occurred between Davis and Minor's private mobile phones. Therefore, Respondent has no basis to assert Davis and Minor's text conversation was so disruptive of workplace discipline[35] as to weigh in favor of their losing protection under a traditional *Atlantic Steel* analysis.[36]

Although the ALJ asserts that Davis's and Minor's communications cross the line into unprotected territory, the ALJ failed to specifically state what Davis and/or Minor said that crossed the line. Minor and Davis complained about COO Branch, their complaints were not accompanied by any verbal or physical threats, and the Board has found far more egregious personal characterizations and name-calling to be protected.[37]

Similarly, any discussion Minor and Davis had about a relationship between CEO Harris and COO Branch was not egregious. It must be noted that the text messages make no mention of the undisputed relationship between COO Branch and CEO Harris. Even so, to the extent the Respondent characterized the text messages as being about the relationship between COO Branch and CEO Harris, then those discussions were also protected. There is no slur or epithet. To the contrary, Davis' concern about COO Branch is objectively based on COO Branch's management style, perceived deficiencies, perceived unethical influence on CEO Harris, and because Davis believed Branch might dislike and mistreat Frazier.

---

[35] Although Graves' email asserts that there was talk about Branch wearing a dress and the relationship between Branch and Harris, the evidence presented at trial indicates only that Graves knew about the text messages was because she viewed Minor's text messages without Minor's knowledge.

[36] See, e.g., *id.* at 800 (Board upheld ALJ finding that employee statements during an employee meeting held in a conference room were outside the employee work area and therefore did not disrupt the work process).

[37] See, e.g. *Stanford Hotel*, 344 NLRB 558, 558-559 (2005) (the calling of supervisor a "liar and a bitch" and a "fucking son of a bitch" not so opprobrious as to cost the employee the protection of the Act). See also *Alcoa Inc.*, 352 NLRB 1222, 1226 (2008)(reference to supervisor as an "egotistical fuck" protected).

As previously noted, it was never denied by Respondent at trial that CEO Harris and COO Branch were in a romantic relationship. This relationship was in violation of Respondent's fraternization policies. Employees' discussions about supervisors/managers violating company work rules are protected concerted activity. Especially a rule regarding "inappropriate familiarity" the ALJ found to be unlawful. (ALJD at 14, 37-39).

To the extent that the ALJ relied on the e-mail by Graves to support a finding that Minor and Davis lost the protection of the Act, the ALJ also erred. As noted above, the Graves did not testify at the trial.[38] Davis and Minor both believed the texts were private. (GC 21). Both Davis and Minor had no idea how COO Branch learned about the texts. (Tr. 176:9-177:11, 272:6-8). The evidence only supports a finding that Graves saw some portion of the texts when Minor left her phone unattended. (Tr. 171:5-9). Nonetheless, there is nothing in the text messages or Graves' email that is so *opprobrious conduct*, resulting in Minor and Davis losing the protection of the Act

Based on the record as a whole, Respondent has not met its burden to show that Minor and Davis forfeited the protections of the Act, and the ALJ erred in finding that Minor and Davis lost protection of the Act.

F. Counsel's Motion at Trial to Amend the Amended CNOH to Add Allegations

[38] The email was not entered into evidence for the truth of the matter asserted, and Counsel maintains that the contents are not properly utilized by the Board as true. However, if the ALJ's finding is upheld that the contents of the e-mail are true, then Counsel would have the Board note the email from Graves alerted COO Branch about the fact that Davis and Minor engaged in protected concerted activity regarding the inappropriate relationship between COO Branch and his supervisor CEO Harris in violation of Respondent's work rules, and regarding mistreatment of a fellow employee, Frazier. (EYP 7).

As noted in Cross-Exception Nos. 13 and 33, the ALJ erroneously failed to amend the Amended CNOH as requested by Counsel at trial and failed to make findings of fact and legal conclusions regarding the proposed amendments.

The Board will permit the litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within 6 months of a timely filed charge and is closely related to the allegations of the timely charge. *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 (Dec. 16, 2014). The Board's test for determining whether the otherwise untimely allegation is closely related to the timely charge is set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I,* the Board considers (1) whether the otherwise untimely allegation involves the same legal theory as a timely filed allegation; (2) whether the otherwise untimely allegation arises from the same factual situation or sequence of events or involves similar conduct during the same time period, and with a similar object; and (3) whether a respondent would raise the same or similar defenses to both allegations. Id. at 1118; *see also Carey Salt Co.*, 360 NLRB No. 38, slip op. at 6 (2014).

All of the requested amendments at trial meet the criteria established in *Redd-I Inc.* In particular, the verbal amendment adding Davis to the Amended CNOH meets the Board's criteria. First, the termination of Davis involves the same theory of unfair labor practice as the allegations related to Minor. Additionally, the termination of Davis arises out of the same factual situation as the termination of Minor. Significantly Davis and Minor were terminated on the same day, and with significantly similar supporting documentation, and with citations to the same unlawful work rules. Finally, Respondent

raises substantially similar *Wright* Line defenses for the discharge of Minor and Davis. (GC-9; GC-10). Based on the above, the amendments at trial were proper.

IV. CONCLUSION[39]

The evidence at the hearing support a finding that Respondent violated the Act as alleged above. Counsel respectfully requests a finding that Respondent has violated the Act as alleged in Paragraphs 5(a), 6, 7(b), 7(c), 7(d), 8(a), 8(b), and 9 of the Amended CNOH, including the proposed verbal amendments to Paragraph 9 that Counsel proposed at the hearing in this matter.

Respectfully Submitted,

/s/ Amiel J. Provosty
Amiel J. Provosty
Counsel for the General Counsel
National Labor Relations Board
Region 15
F. Edward Hébert Federal Building
600 South Maestri Place, 7th Floor
New Orleans, Louisiana 70130

[39] See Cross-Exceptions Nos. 14 and 15.

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2016, I electronically filed a copy of the foregoing COUNSEL FOR THE GENERAL COUNSEL'S BRIEF IN SUPPORT OF ITS CROSS-EXCEPTIONS with the National Labor Relations Board and forwarded a copy by electronic mail to the following:

Michael J. Laughlin, Esq.
3636 S. I-10 Service Rd. W.
Suite 206
Metairie, Louisiana 70001
laughlinmichael@hotmail.com

/s/ Amiel J. Provosty

Amiel J. Provosty
Counsel for the General Counsel
National Labor Relations Board
Region 15
F. Edward Hébert Federal Building
600 South Maestri Place, 7th Floor
New Orleans, Louisiana 70130
Caitlin.Bergo@nlrb.gov